IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
Arbitration Application No.111 of 2005

Shamrock International Ltd. Applicant
Vs.
Amrutanjan Ltd. Respondent

Mr.Keviek Setalwad with Mr.Aleram i/b M/s. Hiralal Thakkar & Co. for applicant.
Ms.Jayashri Manjrekar for respondent.

CORAM: B.H.MARLAPALLE ,J.
March 10, 2006.

P.C.

. Heard the learned counsel for the respective parties who signed a supply agreement on 23rd January 2002 between them. The present applicant is the exporter and the respondent is the manufacturer for a product called "Cis (+) Hydroxy Lactum" and the manufacturer was to supply a total quantity of 60,000 Kgs. of the said product. By a legal notice dated 2/5/2005 the applicant called upon the respondent invoking clause 24 of the said agreement for arbitration and suggested the names of three retired Hon'ble Judges of this Court for being selected as the sole arbitrator. This legal notice has been replied to on 9/5/2005 pointing out that the claim was only to defeat the orders passed by this Court from time to time.

. The respondent-company has filed its reply

opposing this application. It is stated that the respondent had filed Company Petition No.492 of 2004 for winding up as its claim of Rs.95,57,738/- was not satisfied by the present applicant. The learned Single Judge dismissed the said petition by his order dated 4/4/2005 and gave liberty to the petitioner to file a suit within a period of four weeks and directed to deposit an amount of Rs.50 lakhs within a period of four weeks. This order came to be challenged in Appeal No.363 of 2005 by the present applicant and the appeal was dismissed by the Division Bench on 27/4/2005. However, the amount of Rs.25 lakhs was directed to be deposited and for the remaining amount of Rs.25 lakhs, the appellants were directed to furnish a Bank guarantee and the period for deposit was extended from four weeks to twelve weeks. The learned counsel for the respondent now states that the suit could not be filed owing to the pendency of this application, the cause of action for which arose only after the Division Bench dismissed the appeal of the present applicant.

. In the legal notice dated 2nd May 2005 the basis for the arbitral reference is stated in the following words:

> " By a supply agreement dated 23rd January 2002 you had agreed to manufacture and deliver 60,000 Kgs. of products 'CIS (+) Hydroxy Lactum' on exclusive sale basis on the terms and conditions recorded therein. You have committed breaches of various terms and conditions of the said supply Agreement such as late delivery, part delivery, non-delivery of the said products including various other conditions of the said supply Agreement resulting into heavy financial losses suffered by our clients to your knowledge."

. The learned counsel for the respondent has rightly drawn my attention to the following observations of the Division Bench in its order dated 27/4/2005 dismissing Appeal No.363 of 2005 filed by the present applicant:

> " In the circumstances, we are in agreement with the learned Judge that the defence is nothing but an afterthought and solely with a view to avoid payment of the Respondents dues. Moreover it is pertinent to note that most of the damages claimed by the Applicant, are remote damages, which cannot be granted. Further, there is no evidence whatsoever of the difference between the market price and the contract price in respect of the goods which according to the Applicant were supplied after considerable delay."

. Under the circumstances, the contentions of the respondent that the remedy of arbitration has been sought only by way of an afterthought and to

defeat the claim of the respondent-company which claim could be substantially raised in the suit which is likely to be filed immediately after this application is decided will have to be accepted. Undoubtedly the applicant-company would also have a right to agitate its counterclaim in the said suit by filing a cross-claim.

. The application is, therefore, rejected with liberty to the applicant to raise its cross-claims in the suit to be filed by the respondent. It is made clear that in case such a suit is not moved by the respondent within a period of four weeks from today, the applicant is at liberty to approach this Court by fresh application.

(B.H.MARLAPALLE,J.)